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UNITED STATES SUPREME COURT
October Term 1996

BASIC ENERGY CORPORATION,
A Florida Corporation

Petitioner,

vs.

LAWTON CHILES, in his official capacity as Governor of the State of Florida, HARRY K. SINGLETARY, JR., in his official capacity as Secretary of the Department of Corrections of the State of Florida

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

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98 pp

Questions Presented for Review.

Where the State of Florida Department of Corrections knowingly constructed a prison on real property it did not own, in violation of state eminent domain statutes and constitutional provisions:

1. Is the property owner denied its substantive due process rights under the Fifth Amendment to the United States Constitution?

2. Does the subsequent filing of a state court eminent domain case by the State require the dismissal of the landowner's previously filed federal civil rights case under the exhaustion of state remedies doctrine?

3. Is the ongoing violation of criminal trespass statutes a substantive due process violation?

4. Did the United States Court of Appeals commit error when it found that the City of Jasper had donated the property to the Department of Corrections?

List of Parties to the Proceeding:

Petitioner, Basic Energy Corporation, is a Florida Corporation and is the fee simple title holder to real estate located in Pinellas County, Florida.

Respondents are the Honorable Lawton Chiles, in his official capacity as Governor of the State of Florida, and the Honorable Harry K. Singletary, Jr., in his official capacity as Secretary of the Department of Corrections of the State of Florida.

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Statement of Jurisdiction

This Petition of Writ of Certiorari seeks a review and reversal of a final order of the United States Court of Appeals for the Eleventh Circuit.

(i) Date of Judgment Sought to Be Reviewed. The Final Order of the United States Court of Appeals for the Eleventh Circuit was rendered January 13, 1997.

(ii) Date of Order on Rehearing. No motion for rehearing was filed by either party.

(iii) Statutory Provision Conferring Jurisdiction. This Court has jurisdiction over this action pursuant to the provisions of 28 U.S.C. 1254 (1994) for the following reasons:

A. This Petition seeks a writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit rendered January 13, 1997.

B. Certiorari should be granted to reverse a ruling of the United States Court of Appeals for the Eleventh Circuit for the following reasons:

This ruling results from a error in judgment by the State of Florida Department of Corrections in constructing a prison facility on property that it does not own. This prison was constructed in anticipation that the City of Jasper, Florida would prevail on an appeal in state court by Basic Energy Corporation of an order of taking rendered in favor of the City. The Department of Corrections anticipated that the City would win this appeal, and then donate the property to the Department, so it built the prison before the appeal was finished. The City lost the appeal, and the order of t ‹ing was vacated. The

Department of Corrections refused to vacate the property, even though its actions constituted a criminal trespass. Basic Energy then filed this case, seeking an ouster of the State of Florida agencies from its property. No compensation was sought, only injunctive relief.

The District Court dismissed, contending that Basic Energy must defend an eminent domain proceeding filed after Basic Energy instituted its federal civil rights claim. The Court of Appeals affirmed, and found no substantive due process violation. By allowing the State of Florida Department of Corrections to physically occupy Basic Energy's property without color of title or authority, this ruling:

1) Conflicts with a decision of the United States Court of Appeals for the Ninth Circuit, Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), which specifically held that federal civil rights jurisdiction existed over improper entries by state government onto private property where the landowner is seeking injunctive relief based on due process violations, and not just compensation. In this case, the sole requested relief is injunctive relief.

2) Conflicts with multiple decisions of the Supreme Court of the State of Florida, including Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla., 1990), State Road Department of Florida v. Tharp, 1 So.2d 868 (Fla., 1941) and Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 640 So.2d 54, (Fla., 1994), all of which specifically hold unconstitutional any impairment of the rights of a landowner without full completion of a proceeding in eminent domain proceeding.

3) Conflicts with multiple decisions of the United States Supreme Court, including Williamson County Regional Planing Commission v.Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), which specifically holds that due process claims are not subject to any requirement to exhaust state court remedies, United States v. Clarke, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed. 373 (1980), which held that statutes that enable state agencies to condemn property require the filing of a proceeding in eminent domain, and prohibits condemnation by physical occupation, and Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), which requires pre-deprivation process.

4) decides an important question of federal law governing and terminating the right of citizens to prevent the state government from illegally occupying private property in violation of state statutes and state constitutional provisions. This is a classic 42 U.S.C. 1983 case, where the Governor and his department have made a calculated decision to intentionally violate the property rights of one of its citizens in order to expedite the construction of a prison, guessed wrong on the outcome of a pending appeal, and instead of immediately vacating property owned by its citizen, illegally maintained possession and control without deed, title, lease, option, donation, or any color of title whatsoever. Lacking federal intervention, the property owner has no recourse.

(iv) No Notification under Rule 29.4(b), Rules of the United States Supreme Court, is required, as this Petition does not draw into question the Constitutionality of any act of the United States Congress.

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved in the Case

The following Constitutional Provisions and Statutes, in addition to the Amended Complaint, the District Court Order of Dismissal, and the affirmance by the Court of Appeals, are set out in the appendix:

United States Statutes and Constitution

Fifth Amendment to the United States Constitution
42 U.S.C. 1983
28 U.S.C. 2201
28 U.S.C. 1291
28 U.S.C. 1332

Florida Statutes

944.095 (1995)
944.10 (1995)
945.27 (1994)
945.27 (1995)
810.09 (1995)
20.04 (1995)
20.315 (1995)

Statement of the Case

Basis for federal jurisdiction in the court of first instance: 28 U.S.C. 1331 (federal question).

Prior to March, 1994, Basic Energy Corporation, a Florida Corporation, (formerly known as TSI Southeast, Inc.) was the owner of real property located in Hamilton County, Florida (hereinafter referred to as the Basic Energy Site). Basic Energy Corporation intended to develop a bio-medical waste incinerator, and obtained the necessary permits from the Florida Department of Environmental Protection, TSI Southeast, Inc. v. Hamilton County, 587 So.2d 1378 (Fla 1st DCA 1991). In addition, Basic Energy obtained building permits from Hamilton County.

Due to disputes interfering with Basic Energy's efforts to construct its bio-medical incinerator facility, Basic Energy filed a Section 1983 Action in the United States District Court for the Middle District of Florida, Jacksonville Division, Basic Energy Corporation v. Lawton Chiles, City of Jasper, Hamilton County, Et al., Etc., Case No. 93-1320 Civ-J-10. This case is presently pending in the United States District Court for the Middle District of Florida, Jacksonville Division (hereinafter referred to as Case 93-1320 or the 1993 Civil Rights Action).

During the pendency of the 1993 Civil Rights Action, in March of 1994 the City of Jasper, Florida, one of the Defendants in that action, instituted an eminent domain proceeding in the Circuit Court of Hamilton County, City of Jasper v. Basic Energy Corporation, Case No. 94-84-CA (hereinafter referred to as Case 94-84, or "the first eminent domain case). In this action, the City of Jasper sought an order in eminent domain directed at the real

property upon which Basic Energy was building its medical waste incinerator, for the express purpose of divesting title to the subject property from Basic Energy and transferring that title to the State of Florida for the Construction of a state prison.

On May 13, 1994, the City of Jasper obtained an Order of Taking, and Basic Energy appealed to the First District Court of Appeals for the State of Florida.

In July of 1994, the State of Florida Department of Corrections (hereinafter, Department of Corrections), operating under a time line to institute construction of state prisons, made a decision to gamble on the outcome of the appeal. Anticipating that the City would win, the Department of Corrections, in violation of Florida statutes on prison siting, construction, eminent domain statutes, and without any legal authority, entered the real property and instituted construction of a state prison. This was done with no contract, lease, or other documents of title. There was no deed, donation, gift, lease, grant, or any other document or oral transfer of any nature between the City and the Department of Corrections. At the time of entry, Florida Statutes required the Department of Corrections to obtain the approval of the Board of Trustees of the Internal Improvement Trust Fund to institute any proceeding in eminent domain, and no approval for the occupation of Basic Energy's property was obtained, Section 945.27, Fla. Stat. (1994). No authority was obtained, and no eminent domain proceeding was conducted by the Department of Corrections. On April 6, 1995, the First District Court of Appeals reversed the Order of Taking, opinion at Basic Energy Corporation v.

Hamilton County and City of Jasper 652 So.2d 1237 (Fla. 1st DCA 1995) (Appendix 4-10) and on April 25, 1995, issued a mandate on the reversal.

On April 27, 1995, Basic Energy Corporation (hereinafter, Basic Energy) instituted this Case against Governor Lawton Chiles and Harry Singletary, Secretary of the Department of Corrections of the State of Florida (hereinafter collectively referred to as Department of Corrections). The original Complaint sought an injunction stopping construction of a prison on its property, and seeking the ouster of the Department of Corrections from possession.

On July 3, 1995, Basic Energy filed its Amended Complaint (Appendix 11-22). The Amended Complaint sought an injunction stopping construction and ousting Department of Corrections from possession, a declaration that all improvements constructed by the Department of Corrections are the property of Basic Energy, an injunction against institution of state eminent domain proceedings based on bad faith, and other injunctive relief. No financial relief was ever sought in either the original complaint or the amended complaint.

On September 8, 1995, the Hamilton County Circuit Court entered specific order vacating the May 13, 1994 order of taking in favor of the City of Jasper. Upon obtaining the specific order vacating the Order of Taking, on September 8, 1995, Basic Energy posted "No Trespassing" signs on the Prison site and again demanded the Department of Corrections to vacate the site. Instead, the Department of Corrections remained on the site, and continued construction. The "No Trespassing" signs were

thereafter removed by unknown persons. In keeping with its efforts to retake possession of its property, Basic Energy filed a trespass charge with the Sheriff of Hamilton County, Florida. To date, the Sheriff has declined to provide Basic Energy with any assistance in retaking its property.

On January 11, 1996, the District Court entered its order dismissing this case without prejudice (Appendix 23-38), denying a pending motion for preliminary injunction, and remanding the eminent domain case to state court. On February 12, 1996, Basic Energy filed a timely notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. In April of 1996, the state court eminent domain case was dismissed, and the State of Florida filed a second eminent domain case that is presently pending in state court. Following oral argument, on January 13, 1997, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's dismissal (Appendix 39-42).

Summary of Argument

1. Where the State violates its own statutes and constitutional provisions protecting the property rights of its citizens, the citizen is thereby denied its substantive due process rights under the Fifth Amendment to the United States Constitution. The Fifth Amendment contains two discrete provisions: (1) substantive due process, and (2) just compensation. This is not a taking case, and does not seek just compensation. This is a substantive due process case, seeking to have the State of Florida ousted from occupation and possession of Basic Energy's real property due to the State of Florida's failure to comply with the substantive due process requirements of the eminent domain statutes.

Under the statutes and Constitution of the State of Florida, any State agency seeking to exercise the power of eminent domain to take possession of private real property must comply with the following conditions precedent:

A. There must be a legislative delegation to the governmental body of the power of eminent domain, and the body must strictly comply with all conditions precedent to its exercise,

B. The governmental body must file a petition in eminent domain, which the property owner may defend by raising defenses of lack of public necessity or bad faith.

C. A full evidentiary trial is required on all defenses of the property owner.

D. In the event an order of taking is entered, the governmental body must post an amount in the registry of the court.

Only after the foregoing steps are accomplished, is the governmental body entitled to take possession of the realty.

E. The property owner is constitutionally entitled to appeal the order of taking one level of appeals, which does not stay the order, but instead maintains the non-final nature of the order through the completion of the appeal.

In this case, the State of Florida, Department of Corrections, has never complied with any statutory or constitutional requirement as a condition precedent to its construction and operation of a State Prison on Basic Energy's property. Florida Statutes 944.10, governing the siting of a prison, specifically prohibit such methods of occupation.

In July of 1994, the governing statute granting the power of eminent domain to the Department of Corrections, Section 945.27, delegated the power to utilize the power of eminent domain in conformance with the laws of the State of Florida, and only after receiving the express permission of the Board of Trustees of the Internal Improvement Trust Fund. The State of Florida, Department of Corrections, never obtained the consent of the Board of Trustees of the Internal Improvement Trust Fund, and never completed a proceeding in eminent domain pursuant to the applicable provisions of the law of the state of Florida.

The trial court ruled that, since the State was proceeding in eminent domain in a case filed after this case, Basic Energy would be entitled to raise its Federal and State rights in that forum, and accordingly, dismissed this case without prejudice on the theory that Basic Energy was

required to exhaust state remedies by defending a subsequently filed petition in eminent domain by the Department of Corrections, leaving the State of Florida in possession of Basic Energy's property in violation of law. There has never been any case that supports this contention.

The trial court in this case has effectively ruled that the Just Compensation clause of the Fifth Amendment overrides substantive due process, and failed to acknowledge that the State of Florida Department of Corrections does not have any right to appropriate property through physical occupation without court order. The trial court ignored Basic Energy's right to exercise complete physical control of its property unless and until the State of Florida, Department of Corrections, complied with all substantive and procedural safeguards required by the Florida Statutes and Constitution.

The State of Florida, Department of Corrections, has no right to be on Basic Energy's real property. Basic Energy is entitled to the entry of an injunction requiring the State of Florida to vacate its property forthwith.

2. The District Court, and the Court of Appeals, committed error in holding that a federal civil rights case is superseded by a subsequently filed state court eminent domain case, requiring the Petitioner to defend that case as a condition precedent to bringing substantive due process claims in federal court. The cases requiring exhaustion of remedies apply only to cases seeking just compensation, and not to substantive due process claims.

3. By illegally occupying Basic Energy Corporation's property without compliance with the state eminent domain

procedures, the State of Florida Department of Corrections has continually violated the criminal trespass laws of the state of Florida, subjecting Basic Energy Corporation to an unconstitutional deprivation of substantive due process.

4. The Court of Appeals incorrectly held that the City of Jasper had donated the property to the State of Florida Department of Corrections. This is both factually and legally incorrect. There was never any form of a donation, either orally or in writing, and there was never any transfer, gift, lease, option, deed, or any other donation or transfer of the property to the State of Florida Department of Corrections. Further, the First District Court of Appeals in Basic Energy Corporation v. Hamilton County, Basic Energy Corporation v. Hamilton County and City of Jasper, 652 So.2d 1237 (Fla. 1st DCA 1995), (Appendix p.1) held that the City of Jasper's effort to condemn the property in order to donate the land for a state prison was unconstitutional. The crux of the decision of the Court of Appeals lies in its contention that a donation of the property had occurred, which is incorrect, and must be reversed.

Argument

1. Basic Energy Corporation has been denied its substantive due process rights under the Fifth Amendment to the United States Constitution.

In this case, the State of Florida Department of Corrections violated its own statutes, and in order to expedite the construction of a property, illegally occupied Basic Energy Corporation's property and ousted it from possession with no pre-deprivation hearing.

The power of eminent domain of the Department of Corrections is derived from Section 945.27, Fla. Stat., (1994 and 1995), which provides that the Department of Corrections, " . . . is hereby empowered and authorized to exercise the right of eminent domain and to proceed to condemn the property in the same manner as proved by law for the condemnation of property." The United States Supreme Court, in United States v. Clarke, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed. 373 (1980), specifically ruled that where an enabling statute grants a governmental entity the power to "condemn", the statute requires the condemning authority to institute condemnation proceedings and does not delegate the right of the condemning authority to appropriate through physical occupation without process. In Clarke, the United States filed a trespass case against cities in Alaska and others due to their occupation of indian trust lands. The District Court denied the relief, as did the Court of Appeals, relying on the available remedy of inverse condemnation. The United States Supreme Court reversed, stating:

(T)he term " ondemned" (in an enabling

statute) refers not to an action by a landowner to recover compensation for a taking, but to a formal condemnation proceeding instituted by the condemning authority. Id., at 259, 1131.

Accordingly, under the express ruling of the United States Supreme Court, since the Department of Corrections is statutorily delegated the power to condemn and the power to institute condemnation proceedings, this requires the authority to institute an eminent domain proceeding and specifically prohibits the condemning authority from appropriating the property through physical occupation. As stated in the Florida Statute delegating to the Department a limited power of eminent domain, Section 945.27, Fla. Stat., the Department of Corrections is empowered to "condemn" property in the manner provided by law for the "condemnation of property." Under this clear ruling of the United States Supreme Court, this statute requires the Department of Corrections to institute a proceeding in eminent domain. It does not authorize the Department of Corrections to declare martial law and invade and criminally trespass on a landowner's property, requiring the landowner to acquiesce to the taking and seek monetary relief through an inverse condemnation proceeding. The Florida Supreme Court confirmed this position in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla., 1990). In this case, landowners contested the constitutionality of a statute that allowed the Department of Transportation to impose a development moratorium on property in a transportation corridor. The Department of Transportation argued that

the landowners possessed the power of inverse condemnation as an available remedy for any damages. The Florida Supreme Court rejected this argument, and ruled the statute unconstitutional, stating:

> Rather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislative mandated procedural and substantive protections of chapters 73 and 74. Id., at 625.
>
> DOT contends that Joint Ventures' right to seek compensation through inverse condemnation cures the statute's failure to expressly provide for compensation. We disagree. Although the right to seek relief through inverse condemnation is implied in the constitution and a compensation provision need not be expressly included for an owner to be entitled to such compensation, see *First English*, that remedy is not equivalent to a property owner's remedy under the doctrine of eminent domain. Inverse condemnation affords the affected property owner an after-the-fact remedy, when there has already been a "taking" by regulation, and it is not a substitute for eminent domain protection facilitated by chapters 73 and 74. Id., at 627.
>
> The property owner who must resort to inverse condemnation is not on equal footing with an owner whose land is "taken" through formal

condemnation proceedings. The former has the burden of seeking compensation, must initiate the inverse condemnation suit, and must finance the costs of litigation without the procedural protections afforded the condemnee. Id., at 627.

The Department of Corrections has no power to "appropriate" real property by physical occupation, and has not been statutorily delegated any such power by the Florida legislature. The Department of Corrections is empowered to condemn land as provided by law, which requires the completion of an action in eminent domain. The fact that the Department of Corrections knowingly built a prison on the Defendant's property without statutory compliance constitutes a substantive due process violation.

Basic Energy's Complaint and Amended Complaint do not seek monetary damages in any count. This claim is not brought under the "just compensation" clause of the Fifth Amendment to the United States Constitution. It is brought under the "Due Process" clause of the Fifth Amendment to the United States Constitution. Since the State of Florida Department of Corrections has not complied with the necessary conditions to obtain title to Basic Energy's property, its present occupation of that property is a continuing violation of Basic Energy's substantive due process rights protected by the Fifth Amendment to the United States Constitution. The Fifth Amendment contains two separate provisions; the due process clause, and the just compensation clause. As stated by the Florida Supreme Court in Tampa-Hillsborough County Expresswav Authority v. A. G.W. S. Corporation,

640 So.2d 54, 57 (Fla., 1994):

> The fifth amendment contains two discrete protections: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend.V. The first of these is commonly called the "police power," the second is the power of eminent domain. Id., citing Department of Transportation v. Weisenfeld, 617 So.2d 1071 (Fla. 5Th DCA 1993).

In the Amended Complaint, Basic Energy seeks a federal injunction requiring the Department of Corrections to vacate the real property owned by Basic Energy Corporation. There is no claim for just compensation. Basic Energy's claims are based on substantive and procedural due process rights that prevent the Department of Corrections from occupying its property unless and until it complies with Chapters 73 and 74, Florida Statutes, and receives a valid and enforceable order of taking in eminent domain. As cited by the Florida Supreme Court in Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 640 So.2d 54, 67 (Fla., 1994) citing Department of Transportation v. Weisenfeld, 617 So.2d 1071, 1080 (Fla. 5th DCA 1993), citing Wiseman, Patrick, "When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity, 63 St. John's L.Rev. 433, 437 (1988):

> Courts frequ ntly fail to make the distinction

between two ways in which government may abuse its power: first, government may act arbitrarily, in violation of due process; second, government may so intrusively regulate the use of property in pursuit of legitimate police power objectives as to take the property without compensation, in violation of the just compensation clause. In the first case, the government action is simply invalid; in the second case, the government action is invalid absent compensation, and so government may either abandon its regulation or validate its action by payment of appropriate compensation, i.e., by exercising its power of eminent domain. The failure to distinguish between these two abuses of government power contributed to the confusion and apparent incoherence of taking law. *Wiseman*, supra, at 438. Weisenfeld, 617 So.2d at 1080 (Griffin, J., concurring. See Also *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Thus, it is evident that while both theories involve "takings" and "police power," the analysis under due process is different from the analysis under just compensation. Regulations found by the courts to be invalid because they deprive landowners of substantially all use of their property without compensation are not ordinarily struck down as unconstitutional. The government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation. In

> situations where state action is declared an improper exercise of police power under due process, the regulation is simply declared unconstitutional. Therefore, a land use regulation can be held facially unconstitutional without a finding that there was an uncompensated taking." Id., at 57.

In this case, the action of the Department of Corrections is simply illegal. It is an improper exercise of police power, since it is done wholly without, and in violation of, statutory or constitutional authority. There is not even a regulation to declare unconstitutional, as there was in Tampa-Hillsborough County Expressway Authority v. A. G.W. S. Corporation, Id. In this case, the Department of Corrections is violating existing statutes, without regulation, authority, or any legal support.

As codified by the eminent domain statutes, Chapters 73 and 74, Florida Statutes (1995), before the Department of Corrections can divest Basic Energy of its property, it must file and serve a petition in eminent domain. Basic Energy has the right to contest the taking on the basis of lack of public necessity, and once the sovereign establishes the necessity, Basic Energy may still block the taking by showing bad faith or abuse of discretion, City of Cocoa v. Holland Properties, Inc., 625 So.2d 17 (Fla. 5th DCA 1993). In Florida, the proof of necessity is a condition precedent to valid exercise of the power of eminent domain; Broward County v. Ellington, 622 So.2d 1029 (Fla. 4th DCA 1993). In addition, Basic Energy has the irrevocable right to appeal any adverse ruling. The right to appeal orders of circuit Courts is a constitutionally vested

right by Article 5 of the Florida Constitution. Crownover v. Shannon, 170 So.2d 299, (Fla., 1964).

There is no statute, constitutional provision, or other authority that provides that the Department of Corrections can legally occupy Basic Energy's property without full compliance with the foregoing processes. As stated by the United States Supreme Court in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016, 104 S.Ct. 2862, 2880, 81 L.Ed.2d 815 (1984). "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking," (emphasis added). As stated herein, the occupation of Basic Energy's property by the Department of Corrections without an order of taking is not "duly authorized by law", and accordingly, equitable relief is available to enjoin such constitutional deprivations.

In 1941, the Florida Supreme Court decided the case of State Road Department of Florida v. Tharp, 1 So.2d 868 (Fla., 1941), in which the Florida Supreme Court stated:

> American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the State and all other assailants. The State may condemn his property for public use and pay a just compensation for it, but it will not be permitted to grab or take it by force and the doctrine of nonsuability should not be so construed. Forceful taking is abhorrent to every democratic impulse and alien to our political

concepts.

> It is one of the first duties of constitutional government to protect, and where the sovereign has a right to condemn for public use, it will not be permitted to appropriate except by orderly processes. The current of the law on this point will not lead to any other conclusion. Id., at 870 (emphasis added).

The "orderly processes" required by the Florida Supreme Court have been codified in Chapters 73 and 74, Florida Statutes (1995).

The Department's position, if valid, would actually moot Chapters 73 and 74, Florida Statutes, moot the Constitutional provisions of due process allowing a land owner to contest a taking, and would moot the Constitutional provisions of Article 5 of the Florida Constitution giving a landowner an absolute and unqualified right to appeal an adverse order of taking. It would moot the power of the legislature to control and delegate the power of eminent domain. If the Department of Correction can legally do what it has done to Basic Energy, then any state department can simply physically occupy private real property, whether or not it has the power of eminent domain, take possession of property even if it has no statutory right to own or possess property, and file an eminent domain action if and when it feels like it, after constructing or using the property in any manner it deems appropriate.

Simply stated, this is not the law. Both the United

States Supreme Court and the Florida Supreme Court have clearly stated that the Due Process Clause of the Fifth Amendment to the United States Constitution prohibit this activity, regardless of compensation, and the Florida Supreme Court has eloquently prohibited such a taking, exposing such a, " . . . scheme as a thinly veiled attempt to "acquire" land by avoiding the legislative mandated procedural and substantive protections of chapters 73 and 74." Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla., 1990) Id., at 625.

For the foregoing reasons, the occupation and possession of Basic Energy Corporation's real property, without completion of a proceeding in eminent domain, violates the substantive due process rights of Basic Energy Corporation, and accordingly, a Writ of Certiorari should issue.

2. The subsequent filing of a state court eminent domain case does not require the dismissal of a previously filed federal civil rights case under the exhaustion of state remedies doctrine.

The District Court founded its opinion on the concept of exhaustion of state remedies, and found that Basic Energy's opportunity to defend a state court eminent domain proceeding instituted by the State of Florida Department of Corrections after the filing of this case superseded the Plaintiff's federal claim. The court ruled that the State could avoid a federal civil rights case by filing a state court eminent domain case, requiring the Petitioner Basic Energy to defend that case. No case authority has ever held or supported this proposition. The District Court committed error, since the exhaustion case it

improperly relied on, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), requires exhaustion only in cases seeking just compensation. Indeed, the Court in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985) at footnote 14, specifically stated that the Due Process Clause requires pre-taking process. Similarly, this Court in Zinermon v. Burch, 494 U.S. 113, 125-127, 110 S.Ct. 975, 984-985, 108 L.Ed.2d 100 (1990), specifically stated that the Due Process Clause encompasses, " a guarantee of fair procedure," and " . . . The Court usually has held that the Constitution requires some kind of hearing before the State deprives a person of liberty or property." Indeed, the Florida Supreme Court, in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla., 1990), specifically held that a statute impairing a land owner's rights without the prior completion of a proceeding in eminent domain constitutes a substantive due process violation.

Contrary to the ruling of the United States District Court in this case, there is no exhaustion of state remedy requirement for a substantive due process claim. In Sinaloa Lake Owners Association v. City of Simi Valley , 882 F.2d 1398 (9th Cir. 1989), the United States Court of Appeals reversed the dismissal of a Section 1983 case alleging that state officials had violated substantive due process rights of a citizen by entering his property on short notice to breach a dam on private property.

In Sinaloa Lake Owners Association v. City of Simi Valley , 882 F.2d 1398 (9th Cir. 1989), state officials,

operating under their police power, claimed the need to enter private property in order to prevent a dam located on private property from causing harm downstream. Short notice and some form of opportunity to be heard in opposition was provided to the landowner, but this notice was too short to allow the landowner an opportunity to defend. Although the dismissal of the compensation claims were affirmed, the court specifically held that the due process aspect of the case did not require any exhaustion of state remedies.

In this case, both the District Court and the Court of Appeals committed error when they determined that the pendency of a state court eminent domain proceeding, filed after this case, obviated Basic Energy's right to invoke federal jurisdiction to preserve its property rights against state intrusion unless and until the state successfully completed this eminent domain proceeding. If Basic Energy is not entitled to federal intervention, it has no recourse to the illegal occupation of its property by the state government during the pendency of the state court proceeding.

3. The actions of the state officials constitute criminal trespass, which is, in and of itself, a continuing substantive due process violation.

Section 810.09, Fla. Stat., (1995) provides:

> (1) Whoever, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in

S. 810.011, commits the offense of trespass on property other than a structure or conveyance. (2)(a) Except as provided in this subsection, trespass on property other than a structure or conveyance is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. (b) If the offender defies an order to leave, personally communicated to him by the owner of the premises or by an authorized person . . .or trespasses on property other than a structure or conveyance, he is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

On September 8, 1995, Basic Energy corporation posted no trespassing signs on the Basic Energy property, and members of the Department of Corrections appeared as this was taking place, read the signs, and were directed by Basic Energy corporation to leave the Basic Energy site. Written demands to vacate were made on the Department of Corrections by Basic Energy, and these demands have been ignored

All of the elements to establish a criminal trespass have occurred:

1. The land was properly posted, "NO TRESPASSING".

2. The trespassers have no authorization to be on site.

3. The trespassers have received actual communications to leave.

4. The trespassers have defied an order to leave,

personally communicated by the owner of the premises.

5. The trespassers have refused to leave.

The Governor and the Secretary of the Department of Corrections do not have the prerogative to violate criminal statutes. Article IV, Section 1, of the Florida Constitution, provides, " "The supreme executive power shall be vested in a governor. . . he shall take care that the laws be faithfully executed . . ."

In this case, the Governor and the Secretary of the Department of Corrections have chosen to ignore their constitutional and statutory obligations and instead, have conspired to violate the criminal trespass statutes of the state of Florida. This constitutes a continuing substantive due process violation, requiring the reversal of the dismissal of Basic Energy's civil rights action.

4. <u>The Court of Appeals Committed Error in Finding that the City of Jasper had donated the real property in question to the State of Florida Department of Corrections.</u>

In its opinion, the Court of Appeals states, "The City of Jasper had commenced condemnation proceedings in state court, obtained from the state trial court an order of taking, and donated the property to the Department of Corrections, which constructed a prison thereon." (Appendix 36-39).

This statement is factually and legally incorrect. No donation, gift, deed, transfer, or any other method of vesting or transferring the subject property to the Department of Corrections occurred. As observed by the District Court in its opinion (Appendix 20-35):

" (T)he State court entered an "order of taking"

> which, at the least, permitted the City to take possession of the subject land while the litigation in eminent domain continued. The State Department of Corrections then promptly commenced the construction of prison facilities on the site and, over the next year or so, erected improvements costing approximately nineteen (19) million dollars. In the meantime, the Plaintiff here, Basic Energy Corporation, filed an appeal from the order of taking and, on April 6, 1995, the Florida District Court of Appeal for the First District reversed that order . . "

In this case, the State of Florida Department of Corrections went onto property, knowing that it was risking the possibility that it would never receive title to the property, without even filing an action in eminent domain, let alone completing one, and built a prison on property that it knew it did not own. It did so without any color of title or legal authority. It did so under the mistaken hope that the City of Jasper would prevail on its appeal, thereby obtaining title, and the City of Jasper would thereafter transfer the realty to be used for a prison. However, the Department of Corrections guessed wrong, the City of Jasper never obtained title, its order of taking was vacated, and the Department was left illegally occupying Basic Energy Corporation's real estate without any right, title, or interest.

However, instead of confronting the substantive due process issues that are presented by this illegal conduct of the state, the Court of Appeals instead improperly found that the City of Jasper had "donated" the real estate to

the Department of Corrections. There is no fact, allegation, or claim upon which the Court of Appeals could make this finding. There was no donation, and no party has ever alleged that there was a donation. For this reason, this petition should be granted and a writ of certiorari issued to the Court of Appeals with directions to reverse the District Court order dismissing this action.

Summary

For the foregoing reasons, Basic Energy Corporation requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, mandating the reversal of the dismissal of its civil rights action.

/S Donald J. Schutz
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Appendix

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United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BASIC ENERGY CORPORATION
Appellant,

v.

HAMILTON COUNTY, FLORIDA, a Political Subdivision of the State of Florida, THE CITY OF JASPER, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida,
Appellees.

CASE NO. 93-4054/94-1957

_____/

Opinion filed April 6, 1995.

An appeal from the Circuit Court for Hamilton County.
Thomas J. Kennon, Judge and E. Vernon Douglas, Judge.

Donald J. Schutz, St. Petersburg, for Appellant.

William J. Haley, of Brannon, Brown, Haley, Robinson & Cole, PtA., Lake City, for Appellees;

PER CURIAM.

In these consolidated appeals from non-final orders pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B) and 9.130(A)(3)(C)(ii), pertaining to the exercise of eminent domain powers by the city of Jasper, the parties raise the following issue: whether the city's authority to construct jails provides a basis for the exercise of its eminent domain power when the city intends to donate the property condemned to the State of Florida for the construction of a state prison facility.[1]

The city of Jasper and Hamilton County joined together to form a prison Task Force for the purpose of attracting additional prison industry to their area. Pursuant to that purpose, the city ,initiated eminent domain proceedings directed to appellant's property. It is clear from the record that the city intended to acquire the property and donate it to the state for construction of a state prison facility. At hearing, the Jasper city manager indicated the plan was to donate the property to the state, that a state facility was contemplated, and the city would not be involved in its operation or management. Asked if the facility contemplated was a city or county jail, he replied it would be a state correctional facility. He said the prison expansion would provide 1100 additional prison beds and 300 jobs for local citizens, and add 20% to the city's utility revenues, and that the plan was consistent with the city's

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[1]The temporary injunction allowed the city and county to conduct tests on the property, and those tests have already been carried out; thus as to the temporary injunction, this issue appears to be moot.

economic development strategy.

The trial court found the city was authorized to acquire the property in question "by eminent domain for the public purpose of jail or correctional purposes," that "construction of a jail, prison or correctional institution and the operation and maintenance of the same is a proper public purpose" for which the city could exercise its eminent domain power, and that the property sought to be acquired by petitioner herein is necessary for the public purpose of constructing a jail."

On appeal, appellant contends the city's purpose in exercising its eminent domain power in this case is not a valid municipal purpose. Appellee relies on its authority to construct jails pursuant to section 180.06, Florida Statutes, as the valid municipal purpose to be served. However, since it is quite clear the city does not intend to build or operate a jail,[2] section180.06 is not determinative.

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[2]Section 180.06 authorizes municipalities to construct and operate jails. The terms "jail" and "prison" have different legal significance. According to Black's Law Dictionary (6th ed. 1991), the definition of "jail" includes:

> A place of confinement that is more than a police station lockup and less than a prison. It is usually used to hold persons either convicted of misdemeanors . . . or persons awaiting trial or as a lockup for intoxicated and disorderly persons.

The definition of "prison" includes:

> A state or federal correctional institution for

Further. the question is not whether a particular statute specifically permits the exercise of authority; rather, as the following excerpts demonstrate, the question is whether the exercise of authority is for a valid municipal purpose, and if so, whether there is any constitutional or statutory limitation on the exercise of that authority.

"Article VIII, section 2, Florida Constitution, expressly grants to every municipality the authority to conduct municipal government, perform municipal functions, and render municipal services. The only constitutional limitation placed on the municipalities' authority is that such powers be exercised for valid 'municipal purposes.'" City of Ocala v. Nye, 608 So. 2d 15 (Fla. 1992). Municipalities may exercise any power for valid municipal purposes unless expressly prohibited by law. Id.[3] Thus, "whenever a municipality

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incarceration of felony offenders for terms of one year or more. The words "prison" and "penitentiary" are used synonymously to designate institutions for the imprisonment of persons convicted of the more serious crimes as distinguished from reformatories and county or city jails.

[3]In addition, it is clear from the way the terms are used in the Florida Statutes that jails and prisons are not considered to be one and the same. For example, there are separate chapters in the Florida Statutes dealing with Jails and Jailers (chapter 950) and the "State Correctional System" (chapter 944). The state correctional system includes all prisons and state correctional institutions. Section 944.02(1), Florida Statutes (1993). "The words

exercises its powers, a two-tiered question is presented. First, was the action taken for a municipal purpose? If so, was that action expressly prohibited by the constitution, general or special law, or county charter." City of Winter Park v. Montesi, 448 So. 2d 1242, 1244 (Fla. 5th DCA 1984), review denied 456 So. 2d 1182 (Fla. 1984).

"penitentiary," "state prison," or "state prison farm," whenever the same are used in any of the laws of this state, as a place of confinement or punishment for a crime, shall be construed to mean and refer to the custody of the Department of Corrections within the state correctional system . . . ." Section 944.08, Florida Statutes (1993). The legislation concerning the sentencing guidelines distinguishes between state prison sentences and time spent in county jail. See, e.g., section 921.161, Florida Statutes (1993). Section 922.051, Florida Statutes (1993) also recognizes the distinction between state prisons and county jails. Section 166.401, Florida Statutes, provides that municipalities may exercise the power of eminent domain "for the uses or purposes authorized pursuant to this part.", Section 166.411), Florida Statutes, provides that municipalities may exercise the power of eminent domain for "good reason connected in any wise with the public welfare or the interests of the municipality and the people thereof." Since the use of eminent domain is "one of the most harsh proceedings known- to the law, . . . when the sovereign delegates the power to a political unit or agency a strict construction will be given against the agency asserting the power." Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 485 (Fla. 1947).

"A municipality exists in order to provide services to its inhabitants." State v. City of Orlando, 576 So. 2d 1315 (Fla. 1991). A valid municipal purpose must relate "to the conduct of municipal government, exercise of a municipal function, or provision of a municipal service." See Ormond Beach v. County of Volusia, 535 So. 2d 302, 304 (Fla. 5th DCA 1988). Generally, a municipal purpose is one that is related to the health, morals, safety, protection or welfare of the municipality. Id. See also, City of Winter Park v. Montesi, 448 So. 2d at 1244, citing State v. City of Jacksonville, 50 So. 2d 532 (Fla. 1951).

The purpose asserted by appellee and considered by the trial court involves the provision of state correctional facilities. The donation of land for the construction of a state prison may incidentally relate to the protection of municipal inhabitants; however, this purpose is no more particular to residents of the city of Jasper than to any other inhabitants of the state. Thus, we conclude no municipal purpose has been asserted. While we do not hold that no valid municipal purpose could exist for the exercise of eminent domain authority in this case, we conclude the purpose asserted by appellee does not support the exercise .[4]

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[4]The record suggests an alternative municipal-purpose might be one of economic development or economic welfare; however, that purpose was not asserted by appellee in this court or before the trial court, thus it has not been developed in the record or in the arguments before us.

REVERSED and REMANDED for further proceedings consistent with this opinion.

ERVIN, JOANOS and MINER, JJ., CONCUR.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BASIC ENERGY CORPORATION,
A Florida Corporation,

v. Case No. 95-371-Civ-J-10

LAWTON CHILES, in his Official
Capacity as Governor of the
State of Florida, and
HARRY K. SINGLETARY, JR.,
in his Official Capacity as
Secretary of the Department
of Corrections of the State of Florida,

Defendants

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Plaintiff, Basic Energy Corporation (Basic Energy), by and through undersigned counsel, now sues Lawton Chiles, in his official capacity as Governor of the State of Florida (Chiles) and Harry K. Singletary, Jr., in his official capacity as Secretary of the Department of Corrections of the State of Florida (Singletary), and states as follows:

Jurisdictional Facts

1. The Plaintiff is a Florida Corporation, which owns

real property in the State of Florida, located in Hamilton County, (hereinafter, the Basic

Energy Property) which is within the geographical limits of the Jacksonville Division of the United States District Court for the Middle District of Florida.

2. Chiles is the Governor of the State of Florida.

3. Singletary is the Secretary of the Department of Corrections of the State of Florida.

4. This case alleges a factual basis and seeks relief pursuant to the provisions of 42 U.S.C. 1983 and 28 U.S.C. 2201, and this Court has jurisdiction and venue pursuant to 28 U.S.C. 1332.

5. Basic Energy Corporation, a Florida Corporation, is presently, the owner of the real property in Hamilton County, Florida. The real property is hereinafter referred to as the Basic Energy property.

6. Sometime after May 13, 1994, the Defendants in this case, the State of Florida Department of Corrections, entered the Basic Energy Property, and instituted construction of a Florida state prison facility,under the auspices of a legally invalid Order of Taking rendered in favor of the City of Jasper, Florida.

7. Basic Energy Corporation has demanded that the State of Florida vacate the Basic Energy Property.

8. Basic Energy Corporation has not granted the State of Florida, or any Department thereof, including without limitation, the Department of Corrections, permission to enter or remain on the Basic Energy Property.

9. Between May 1994 to the present, Singletary, in his official capacity as Secretary of the Department of

Corrections of the State of Florida, and Chiles, in his official capacity as Governor of the State of Florida, directed agents, contractors, and representatives of the State of Florida to enter the Basic Energy Real Property and institute construction of a State Prison.

10. In May 1995, and continuing to the present, the Defendants received actual knowledge that the Order of Taking rendered in favor of the City of Jasper was legally invalid, and despite this notice, the Defendants have retained illegal control over the Plaintiff's real property.

11. The Department of Corrections of the State of Florida has never held any color of title to the Basic Energy Real Property.

12. Chiles and Singletary have failed and refused to vacate the Basic Energy Real Property, and remain on the Basic Energy Real Property constructing a state prison on said property without color of title or authority.

Count One

13. The Plaintiff Basic Energy realleges and reasserts paragraphs one through twelve.

14. This is an action pursuant to the provision of 42 U.S.C. 1983.

15. Prior to May, 1994, Basic Energy Corporation had received appropriate building and construction permits to construct a bio-medical waste treatment facility on the Basic Energy Property, and had at all times actively pursued the development and construction of this facility.

16. Basic Energy Corporation has had, at all times material hereto, a liberty interest guaranteed under the provisions of the Fourteenth Amendment to the United States Constitution, to pursue and develop lawful business

interests with its property, to wit: a bio-medical waste treatment facility.

17. In 1983, these Defendants joined in a conspiracy to assist the City of Jasper and Hamilton County in depriving Basic Energy Corporation of its liberty interest guaranteed under the Fourteenth Amendment of the United States Constitution to construct and operate a bio-medical waste treatment facility, by assisting and co-operating with the City of Jasper in instituting an illegal eminent domain proceeding.

18. One purpose of the illegal eminent domain proceeding was to construct a state prison on the site of the proposed Basic Energy biomedical waste treatment facility. Upon obtaining an illegal Order of Taking in the state courts, these defendants did enter into and onto the Basic Energy property and did construct a state prison on the Basic Energy bio-medical waste treatment site.

19. As a result of the construction of a state prison on the Basic Energy bio-medical waste treatment site, these Defendants have impeded, interfered with, and deprived the liberty interest of Basic Energy Corporation to engage in the lawful development of a bio-medical waste treatment facility, as follows:

A. Basic Energy Corporation will be required to either relocate or re-engineer the site.

B. Basic Energy's permits are site specific, and the State of Florida contends that the construction of the prison on the Basic Energy site requires amendments or modifications to the permits.

C. Subsequent to the granting of the Basic Energy permits, the State of Florida passed a moratorium on the

construction of bio-medical waste treatment facilities, and based on this permit moratorium, Basic Energy cannot obtain new permits for a new site unless and until the moratorium is either declared illegal and unenforceable, or in the alternative, expires.

20. The entry by the State of Florida onto the Basic Energy Real Property, and the construction of buildings on the Basic Energy Real Property, constitutes a continuing trespass on property of the Plaintiff,and thereby constitutes a deprivation of the Plaintiff's property interest under color of State law and authority without due process, in violation of the provisions of the Fifth and Fourteenth Amendment to the United States Constitution, and in violation of the provisions of 42 U.S.C. 1983.

21. The Plaintiff, Basic Energy Corporation, is suffering irreparable harm on a daily basis due to the continued deprivation of its constitutional rights.

22. The Plaintiff, Basic Energy Corporation, is entitled to injunctive relief requiring the Defendants Chiles and Singletary to cease and desist in their continued deprivation of Plaintiff's liberty interest as set forth herein, under color of State law and authority without due process.

23. The available state remedy of inverse condemnation requires the Plaintiff to allege that its property has been taken, and makes monetary compensation available for said taking. Accordingly, based on the Plaintiff's desire to prevent and terminate the State's illegal possession of its property, the Plaintiff has no adequate remedy under state law.

Wherefore; the Plaintiff Basic Energy Corporation requests this Court to enter a mandatory injunction against

the Defendants Chiles and Singletary, in their official capacities, directing said defendants to cease and desist from further entry and construction on the Basic Energy Real Property, and such other relief as the Court deems appropriate.

Count Two

24. This is an action for declaratory relief pursuant to the provisions of 28 U.S.C. 2201.

25. The Plaintiff realleges and incorporates herein paragraphs one through twelve.

26. The Defendants, Chiles and Singletary, in their official capacities, have constructed improvements, structures, buildings, and fixtures, on the Basic Energy Real Property.

27. The Defendants, Chiles and Singletary, in their official capacities, have commenced this construction with full knowledge that the State of Florida had no right, title, in interest in the Basic Energy Real Property, and that the City of Jasper's sole claim to possession was a non-final Order of Taking which was the subject of an appeal, and as of April 24, 1995, legally invalid.

28. Pursuant to the law of the State of Florida, it is the Plaintiff's position that all assets constructed on the Basic Energy property are now owned by the Plaintiff Basic Energy.

Wherefore; Basic Energy Corporation requests this Court to enter a declaratory judgment, declaring that all buildings, structures, improvements, and fixtures of any nature constructed by the State of Florida, Department of Corrections, are the property of Basic Energy Corporation.

Count Three

29. The Plaintiff realleges and restates paragraphs one through twenty eight.

30. This is an action under 42 U.S.C. 1983, seeking injunctive relief for the purpose of enjoining the Defendants from instituting and prosecuting an eminent domain action against the Plaintiff in the state courts of Florida.

31. In or about October through December, 1993, representatives of the City of Jasper and Hamilton County conspired to cause eminent domain proceedings to be instituted against Basic Energy Corporation for the purpose of:

A. Divesting Basic Energy Corporation of the Basic Energy Property, and;

B. Preventing Basic Energy Corporation from constructing a biomedical waste treatment facility on the Basic Energy Property.

32. In or about October through December, 1993, and continuing to the present, the Defendants, as state officials have engaged in an unlawful conspiracy designed to subvert the lawful powers of condemnation of City and County governments to the end that the Plaintiff is deprived of its lawful right to engage in the business of constructing and operating a biomedical waste treatment facility.

33. By entering onto the Plaintiff's real property and constructing a 1400 bed state prison, without color of title, and solely under the auspices of an illegal Order of Taking obtained by the City of Jasper, the Defendants have violated the substantive due process rights protected by the Fourteenth Amendment to the United States Constitution, by the arbitrary and capricious deprivation of a cognizable property inter st, in violation of the

procedural safeguards provided under the Florida Constitution and Statutes.

34. The Plaintiff is entitled to injunctive relief precluding the threatened future eminent domain proceedings by the State of Florida, Department of Corrections, due to the fact that the Defendants, under color of state law, have engaged in an unlawful conspiracy designed to subvert their lawful powers of condemnation to the end that the plaintiffs are deprived of their lawful right to engage in the business of developing and operating a bio-medical waste treatment facility.

35. A subsequent eminent domain proceeding instituted by the State of Florida, due to the fact that the State of Florida has already constructed this prison on Plaintiff's real property, would serve to ratify the prior intentional violations of Plaintiff's Constitutional rights, under color of State law, by these Defendants.

36. The right of the Plaintiff to have an opportunity to contest the petition in eminent domain, the right to require the Defendants to prove a legal necessity for the taking, the right of the Plaintiff to show bad faith, the right to appeal any order before the divestiture of Plaintiff's property interest is final, and other required procedures as required by statutes and laws of the State of Florida, are all procedural safeguards designed to protect the Plaintiff's substantive and fundamental property rights in the State of Florida. However, the Florida Courts have not, and presently are not, providing the Plaintiff with fast and efficient forums to preserve its rights .

37. By taking the actions as aforesaid, the State of Florida violated the Plaintiff's substantive and fundamental

liberty interest to engage in lawful occupations and business protected by the Fourteenth Amendment to the United States Constitution, which rights are protected against government deprivation regardless of the fairness of the procedures used to accomplish said deprivation.

38. Based on the fact that the State of Florida violated the substantive due process rights of the Plaintiff, additional procedures in the form of a subsequent eminent domain proceeding in state court are insufficient to redress the aforesaid constitutional deprivations.

39. If the State of Florida is permitted to take possession of Plaintiff's private real estate in violation of procedural and substantive due process rights, under the auspices of an illegal state court order, and construct buildings on said property, and thereafter, institute eminent domain proceedings based on the fact and existence of this constitutional deprivation, such a procedure precludes the Plaintiff from contesting a taking of its property, and appealing any adverse order. If the State of Florida is permitted to obtain ownership of Plaintiff's property in a subsequent eminent domain proceeding, thereby precluding the Plaintiff from pursuing its constitutionally protected liberty interest of constructing and operating a bio-medical waste treatment facility, the Plaintiff's substantive and procedural due process rights as stated herein will be rendered meaningless, void, and of no force and effect, and will be permanently lost.

Wherefore; the Plaintiff requests this Court to enter a preliminary and permanent injunction, enjoining and restraining the Defendants from instituting or prosecuting any petition in eminent domain against the Plaintiff in the

state Courts of Florida, and for such other relief as the Courts deem appropriate.

Count Five

40. The Plaintiff realleges paragraphs one through 12.

41. This is an action pursuant to 42 U.S.C. 1983, seeking injunctive relief against the Defendants for violations of the rights of the Plaintiff as guaranteed by the Third Amendment to the United States Constitution.

42. The Third Amendment to the United States Constitution prohibits the State from quartering Soldiers on the Plaintiff's property in time of peace.

43. The officers and employees of the Department of Corrections of the State of Florida are "soldiers" of the State of Florida as defined in the Third Amendment, on the following basis:

A. Said Department of Corrections employees, in part, are armed.

B. Said Department of Corrections employees are, through the use of arms and force, are holding individuals whose civil liberties have been suspended due to convictions of criminal laws, against the will of said individuals .

C. Said Department of Corrections employees are, at all times, state employees under the control of Defendant Chiles, in his official capacity as Governor of the State of Florida and under the control of Harry Singletary, in his official capacity as Secretary of the Department of Corrections.

44. The actions taken by the State of Florida in illegally invading the real property of the Plaintiff, without color of title, authority, and without the consent of the

Plaintiff, and illegally quartering prisoners and corrections officers on said property through the construction and intended development and operation of a state prison, constitutes the quartering of soldiers of the state on real property owned by the Plaintiff during time of peace, in violation of the Constitutional Right of the Plaintiff to be free from said action under the Third Amendment to the United States Constitution.

45. The real property so occupied by the State of Florida is the only real property owned by Basic Energy Corporation, and constitutes the principle asset and business location of Basic Energy Corporation, and thereby constitutes Basic Energy's "house" for purposes of the Third Amendment.

46. There exists no state of war at the time of this illegal quartering. The Third Amendment right is an absolute right, not subject to deprivation through compensation or due process, and accordingly, available state remedies or the availability of monetary damages are insufficient alternatives for the deprivation of this right.

47. The Third Amendment is incorporated into the Fourteenth Amendment to the U.S. Constitution for application to the states, Engblom v. Carey 677 F.2d 957 (2nd Cir. 1982).

Wherefore; the Plaintiff seeks this Court to enjoin the continued violation of the Plaintiff's Constitutional Rights protected under the Third Amendment, as set forth herein, and for such other relief as the Court deems appropriate.

I hereby certify that a copy of the foregoing has been served by U.S.mail, this 3 day of July, 1995, on:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BASIC ENERGY CORPORATION, etc.,
Plaintiff,

-vs- CASE NO. 93-1320-CIV-J-10

LAWTON CHILES, etc., et al.,
Defendants.
_____/
BASIC ENERGY CORPORATION, etc.,
Plaintiff,
-vs- CASE NO. 95-371-CIV-J-10

LAWTON CHILES, etc., et al.,
Defendants.
_____/
CITY OF JASPER, FLORIDA, et al.,
Plaintiffs,

-vs- CASE NO. 95-896-CIV-J-10

BASIC ENERGY CORPORATION, et al.,
Defendants.

CASE NO. 93-1320 CIV-J-10

_____/

ORDER

These related cases are before the Court for consideration of several pending motions.

The facts, as gleaned from the various pleadings and briefs, stated in simplest form and viewed in a light most favorable to the position of the Plaintiff, are as follows. In 1989, the Plaintiff, Basic Energy Corporation (then known as TSI Southeast, Inc.), and officials representing both the City of Jasper and the Hamilton County Development Authority, entered into discussions concerning the Plaintiff's proposed construction of a bio-medical waste treatment facility within the City's industrial park. Formal written contracts were entered into between the parties, including a contract for the purchase of a fifteen (15) acre tract of land by the Plaintiff as the intended site of the project, and the Plaintiff began to apply for and acquire the various licenses and permits necessary to the operation of the intended facility. While these plans were being made and executed, it appears that the County Commissioners of Hamilton County began to take a dim view of the Plaintiff s intended use of the land, and they interposed objection to the issuance of certain necessary permits by the State Department of Environmental Protection. Ultimately, the officials of I the City of Jasper itself, as well as the Development Authority, also changed their minds with respect to the desirability of the Plaintiff's project and decided instead that the Plaintiff's newly acquired real property should be devoted to an expansion of the

Hamilton Correctional Institution, a unit of the State Prison System operated by the Florida Department of Corrections and situated on an adjacent parcel of land.

Accordingly, on March 25, 1994, the City of Jasper instituted in the state courts (the Third Judicial Circuit in and for Hamilton County, Florida), pursuant to authority granted to it under state law (see Florida Statute 166.401 et seq.), an action in eminent domain to acquire title to the Plaintiff's property for the expressed purpose of then donating the land to the State Department of Corrections for its use in constructing prison facilities as an expansion of the existing Hamilton Correctional Institution. Later, on May 13, 1994, the state court entered an "order of taking" which, at the least, permitted the City to take possession of the subject land while the litigation in eminent domain continued.[1] The State Department of Corrections then promptly commenced the construction of prison facilities on the site and, over the next year or so, erected improvements costing approximately nineteen (19) million dollars. In the meantime, the Plaintiff here, Basic Energy Corporation, filed an appeal from the order of taking and, on April 6, 1995, the Florida District Court of Appeal for the First District reversed that order after finding no "public purpose" for the taking as required by Florida Law. Basic Energy Corporation v. Hamilton County, 652 So.2d 1237 (Fla. 1st DCA 1995). In essence, the Court held that

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[1]See, Florida Statute 74.011 et seq. To what extent the order of taking operated to vest title in the City as Condemnor may be a contested legal issue central to the ultimate resolution of the dispute between the parties.

although the construction of a prison may serve a public purpose of the state, it does not serve a public purpose of the City of Jasper as a municipality since the City itself has no power to build or operate a state prison. The fact that the City expected to derive an economic benefit for its citizens in the form of added jobs and other commerce from the use of the subject property, which would remain under the public control of the state, was not enough in the view of the appellate court to justify exercise of the power of eminent domain by the City as distinguished from the exercise of such power by the state. The case was remanded for further proceedings and, on August 24, 1995, an amended petition in eminent domain was filed in the state trial court in which the State Department of Corrections joined the City as a petitioning Condemnor.

The Litigation in this Court

Case No. 93-1320 Civ-J-10

On September 21, 1993, before the commencement of the eminent domain proceedings in state court, the Plaintiff initiated its first action in this Court through the filing of a complaint against the Governor of Florida, [2]the Florida Department of Environmental Protection, Hamilton County and the individual members of its Board of County Commissioners, the Hamilton County Development Authority and its individual members, and the City of Jasper and its individual City Manager. The complaint (Doc. 1) was framed in eight counts. Count I purported to state a claim pursuant to 42 USC § 1983 and, after detailed allegations

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[2]The Governor has since been dismissed by stipulation of the parties (Doc. 72).

of the actions taken by the Defendants to thwart the Plaintiff's plans for the site - - making objections to the issuance of various permits and refusal of utility services, and the like - - the complaint stated (Doc. 1, pp. 36-37, paragraphs 143-147):

> 143. As a result of the foregoing actions of these Defendants, the Plaintiffs were deprived of their property interest to conduct the business of creating, developing, and operating a biohazardous waste treatment facility within Hamilton County, and as a proximate cause thereof, suffered damages.
>
> 144. The injury and destruction of Plaintiffs' property interest as alleged herein constituted the official policy of the STATE OF FLORIDA, HAMILTON COUNTY, AND THE CITY OF JASPER.
>
> 145. The actions of the Defendants named in this Count constitute arbitrary and capricious conduct which does not bear any legitimate relation to public health, safety, welfare and morals and is therefore, a [sic] invalid exercise of the police powers.
>
> 147.[3]The actions of the Defendants named in this Count lacks rationality and lacks any legitimate governmental purpose, which constitutes an impermissible denial of equal protection of the law.

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[3]The complaint did not contain a paragraph No. 146.

Count I concluded with a prayer for both damages and injunctive relief, but no application was made (or has since been made) for any preliminary injunctive relief. Counts II through VII stated various pendent state law claims for breach of contract and for declaratory judgments.[4]

Case No. 95-371 CIV-J-10

The Plaintiff s second action in this Court was filed on April 27, 1995, shortly after the Florida District Court of Appeal filed its opinion reversing the order of taking entered by the state trial court in the eminent domain proceedings. The Defendants in this action are the Governor of Florida and the Secretary of the State Department of Corrections. The First Amended Complaint (Doc. 23, filed July 3, 1995) asserts claims in three counts. Count One is brought pursuant to 42 USC § 1983 and alleges (a) the deprivation of a "liberty interest" to conduct a lawful business, namely, a bio-medical waste treatment facility; and (b) a continuing trespass by the Defendants upon the

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[4]A First Amended Complaint (Doc. 41) was filed September 28, 1994, and consists of eighteen counts. Count II of that amended complaint asserts a claim pursuant to 42 USC § 1983 against Virginia Wetherell as Secretary of the Florida Department of Environmental Protection and contains allegations virtually identical to those quoted in the text from Count I of the original complaint. The remaining counts then restate those allegations against the other individual Defendants, respectively, followed by the pendent claims based on state law - - breach of contract and declaratory judgment causes of action.

Plaintiff's land constituting a deprivation of the Plaintiff's property interest without due process in violation of the Fifth and Fourteenth Amendments. The prayer for relief asks for an injunction requiring the Defendants to cease and desist from "trespassing" on the Plaintiff's property; no damages are sought. Count Two states a claim for a declaratory judgment that all of the improvements constructed by the Defendant on the subject real property, after the invalid order of taking entered in state court, now constitute the property of the Plaintiff. Count Three states a claim under 42 USC § 1983 alleging that the Defendants conspired to deprive the Plaintiff of its substantive due process rights under the Fourteenth Amendment by using the power of eminent domain to deprive the Plaintiff of its right to construct a bio-medical waste treatment facility. The prayer for relief seeks only an injunction against the Defendants (as state officers, not the City of Jasper or Hamilton County) from instituting any eminent domain proceedings in state court; again, no prayer for damages was made.[5]

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[5]There was a Count Four (erroneously denominated as Count Five in the First Amended Complaint) which purported to state a claim under 42 USC § 1983 for a violation of the Third Amendment's protection against the quartering of soldiers in any house in time of peace without the consent of the owner - - the allegation being that the employees of the Department of Corrections constituted "soldiers" within the meaning of the Third Amendment, and because the Plaintiff owns no other real property, that the property in question should be treated as the Plaintiff's

In this action (Case No. 95-371 Civ-J-10), the Plaintiff filed with the initial complaint a motion for a temporary restraining order and a motion for a preliminary injunction (Doc. 2). A hearing was held in open court on May 11, 1995, on the application for a preliminary injunction which, at the conclusion of the hearing, the Court denied (see Docs. 14, 15 and 27).

The Defendant Singletary, as Secretary of the Department of Corrections has now filed a motion to dismiss (Doc. 25) the First Amended Complaint, and the Plaintiff has filed a renewed motion for a preliminary injunction (Doc. 32), as well as a motion to consolidate this action with Case No. 95-986 Civ-J-10 (Doc. 35). These motions will be discussed and decided below.

Case No. 95-896 Civ-J-10

This, the third action now pending in this Court, is actually the eminent domain proceeding initially brought in the state court by the City of Jasper. It was removed to this Court on September 12, 1995, by Basic Energy Corp., the Plaintiff in the other actions, through the filing of a notice of removal (Doc. 1) after the filing in state court on August 24, 1995, of an Amended Petition in Eminent Domain (Doc. 2) in which the State Department of Corrections, in the wake of the appeal reversing the order of taking, joined with the City of Jasper as a Condemnor. Several motions are now pending in that case as well. Foremost among them is a motion to remand filed by the State Department

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"house." Once again, only injunctive relief was sought, not damages. However, this claim has now been voluntarily dismissed by the Plaintiff (Doc. 28, filed August 28, 1995).

of Corrections (Doc. 12).

Discussion

The most noteworthy aspect of the Plaintiff's numerous claims in these cases lies in what is not asserted. Nowhere does the Plaintiff claim an unconstitutional taking of property without just compensation in violation of the takings clause (or the just compensation clause) of the Fifth Amendment. In fact, during the hearing of May 11, 1995 on the application for a preliminary injunction in Case No. 95-371, Plaintiff's counsel expressly disavowed any claim based upon the takings clause of the Fifth Amendment. The absence of such a claim, therefore, is the result of intentional choice, not an accident; and the reason the Plaintiff deliberately avoids the assertion of a "taking" claim is no doubt attributable to the governing decision of the Supreme Court in Williamson County Regional Planning Commission v. Hamilton Bankof Johnson City, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985), that ". . . if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. " This is the rule because the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Id., 473 U.S. at 194, 105 S.Ct. at 3120. See also, Anthony v. Franklin County, 799 F.2d 681 (llth Cir. 1986); Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (llth Cir. 1992); and Reahard v. Lee County, 30

F.3d 1412 (11th Cir. 1994).[6]

Yet, in my view, the unwillingness of the Plaintiff to plead a taking claim, because of its obvious futility, effectively leaves the Plaintiff with no other presently mature constitutional claim. The initiation by public authorities of a state court proceeding for a taking of fee simple title to the whole of a parcel of real estate, coupled with a total ouster of physical possession accomplished by the state or its municipality acting under color of state law through the entry of a judicial order of taking, presents a classic example of a taking of private property for public use as to which the Fifth Amendment ". . . provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, [and] that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims." Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989) (holding that an excessive force claim should be analyzed under the Fourth Amendment, not the Due Process Clause).

In that regard, then, this case is clearly

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[6] Although the Plaintiff alleges in one place (paragraph 36 of the First Amended Complaint, Doc. 23 in Case No. 95-371 Civ-J-10) that "the Florida Courts have not, and presently are not, providing the Plaintiff with fast and efficient forums to preserve its rights," such a contention is utterly belied by the record and by the Plaintiff's other allegations. In fact, the Plaintiff has prosecuted a successful appeal in the Florida courts and has secured a decision vacating the original order of taking.

distinguishable from the so-called regulatory taking cases involving the application of zoning or land use restrictions. In such cases a landowner may have several constitutional claims predicated upon the due process clause, the most applicable or most appropriate of which will be determined on the basis of the nature and extent of the alleged "taking" and the remedy being requested. In most such instances, for example, the appropriate remedy will consist of interim damages for loss of use and injunctive relief against future application of the offending regulation thereby making the available uses of the property (and its owner) whole again. See Eide v. Sarasota County, 908 F.2d 716 (llth Cir. 1990).

The Plaintiff attempts to squeeze this case within the jurisprudence of the regulatory taking or zoning and land use cases by alleging due process violations and by restricting the prayer for relief to injunctive remedies - - to enjoin the continuing "trespass" by the Defendants or to enjoin the prosecution of the eminent domain proceeding itself (Counts One and Three of Case No. 95-371 Civ-J-10). However, to enjoin the alleged trespass in the circumstances of this case (Case No. 95-371 Civ-J-10) would necessarily involve this Court in a review of the order of taking entered in the state courts, since that order is the basis of the Defendants' asserted right to now occupy and possess the subject land, and it is clear in the law under the so-called Rooker-Feldman doctrine that this Court is simply without jurisdiction to inject itself in that way into the state court litigation process. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S.

462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). See also Blue Cross and Blue Shield of Maryland v. Weiner, 868 F.2d 1550 (11th Cir. 1989), and Wood v. Orange County, 715 F.2d 1543 (1983).

Neither is there any basis in the law for this court to enjoin the prosecution of the eminent domain proceedings. In fact, the law is to the contrary. In State of Georgia v. City of Chattanooga, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924), an original proceeding in the Supreme Court, the State of Georgia sought to have the high court enjoin an eminent domain proceeding brought in the state courts of Tennessee by the City of Chattanooga to condemn some land in the City that was owned by the State of Georgia. After noting that "[t]he power of eminent domain is an attribute of sovereignty, and inheres in every independent state," 264 U.S. at 480, 44 S.Ct. at 370, the Court held:

> No complaint is made that the laws of Tennessee do not afford the state of Georgia and other owners reasonable notice and opportunity to be heard before the final determination of judicial questions that may be involved in the condemnation proceedings - - e.g., whether the state has delegated to the city the power to condemn; whether the taking is for a public purpose (Rindge Co. v. Los Angeles, 262 U.S. 700, 705, 43 Sup.Ct. 689, 67 L.Ed. 1186; Hairston v. Danville & Western Railway, 208 U.S. 598, 606, 28 Sup.Ct. 331, 52 L.Ed. 637, 13 Ann. Cas. 1008); and the amount of the compensation (Seaboard Air Line Railway v. United States, 261 U.S. 299, 304, 43 Sup. Ct. 354, 67 L.Ed. 664). Georgia has been given notice and has the right voluntarily to

appear. See Clark v. Barnard, 108 U.S. 436, 447, 2 Sup.Ct. 878, 27 L.Ed. 780. All its objections and defenses may be interposed in the Tennessee court. It appears on the face of the bill of complaint that, if it so elects, Georgia has a plain, adequate, and complete remedy in the condemnation proceedings instituted by the city. Its contention that the requisite power to condemn has not been delegated to the city involves a consideration of the meaning and proper application of the laws of Tennessee, and it is especially appropriate that the Tennessee courts shall first decide that question. The decision of its highest court on that question would be followed by this court. Maguire v. Reardon, 255 U.S. 271, 41 Sup.Ct. 255, 65 L.Ed. 625; Cusack Co. v. Chicago, 242 U.S. 526, 529, 37 Sup. Ct. 190, 61 L.Ed. 472, L.R.A. 1918A, 136, Ann.

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Cas 1917C, 594; Reinman v. *Little Rock, 237 U.S. 171, 176, 35 Sup.Ct. 511, 59 L.Ed. 900; Atlantic Coast Line R.Co. v. Goldsboro, 232 U.S. 548, 555, 34 Sup.Ct. 364, 58 L.Ed. 721. If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for re-examination and review. That suits in equity will not be sustained in any case where a plain, adequate, and complete remedy may be had at law is declared by statute (Judicial Code, § 267 [Comp. St. § 1244]) and established by decisions of this court so numerous that citation is not necessary.

Bill dismissed without prejudice.

264 U.S. at 483, 484, 44 S.Ct. at 371.

Thus, in this instance, the ongoing eminent domain litigation affords the Plaintiff a plain, adequate and complete remedy for the adjudication of all of its federal constitutional claims, to say nothing of its claims under state law, and if the state courts deny any of the Plaintiffs federal rights, the case may be taken to the Supreme Court of the United States.

No doubt anticipating this legal result - - that this Court could not and would not enjoin the eminent domain proceedings in state court - - the Plaintiff (Basic Energy Corporation) sought to accomplish the same objective by removing the eminent domain litigation to this Court (Case No. 95-896 Civ-J-10). It is not alleged, however, that there is any basis for federal jurisdiction inhering in the eminent domain proceeding; there is no federal question presented nor is there a diversity of citizenship. Rather, the only alleged, jurisdictional justification for the removal of the eminent domain proceeding is the prior pendency in this Court of the other actions (Case Nos. 93-1320 and 95-371 Civ-J-10) which do purport to present federal claims. No authority exists for effecting a removal under such circumstances; and, indeed, if removal should be permitted, it would mock and undermine the teaching of the authorities already discussed, namely, that the eminent domain proceeding should be left undisturbed in the state courts

for adjudication by those courts.

Finally, the Plaintiff also seeks to escape the legal effect of the applicability of the taking and just compensation clause of the Fifth Amendment by alleging the deprivation of a "liberty" interest rather than a "property" interest, i.e., that the Defendants have deprived the Plaintiff of its right to engage in the lawful business of operating a bio-medical waste treatment facility in Hamilton County (Count One of Case No. 95-371 Civ-J-10). All of the allegations of the complaint, however, relate to the use of the subject land for that intended purpose, not a general proscription of the business activity itself. Moreover, even if a free standing liberty/due process claim could somehow be extricated from the existing fact pattern, it would not be ripe or mature until the eminent domain proceeding has been completed. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra, 473 U.S. at 200-201, 105 S.Ct. at 3123. It may turn out, after all, that the Plaintiff is successful in asserting its various claims in the eminent domain litigation and/or that the value of the bio-medical waste treatment business is taken into account in fixing the fair market value or just compensation to be paid for the subject land. Either way, the quantification of any damages sought for the deprivation of the alleged liberty interest cannot be made until the result of the eminent domain proceeding is known.

Applying these foregoing principles and conclusions to the various motions presently pending in these three cases, it is,

ORDERED and ADJUDGED,

1. In Case No. 95-371 Civ- I-10,

(a) That the Defendants' motions to dismiss (Docs. 21 and 25) are GRANTED and the Plaintiff's first amended complaint (Doc. 23), and the action as a whole, is hereby dismissed without prejudice.

The Clerk is directed to enter judgment accordingly with costs to be assessed according to law.

(b) That the Plaintiff's renewed motion for a preliminary injunction (Doc. 32) as well as the motion to consolidate Case Nos. 95371 and 95-896 Civ-J-10 (Doc. 35) are both DENIED as MOOT.

2. In Case No. 95-896 Civ-J-10,

(a) That the motion to remand filed by the Plaintiff, Florida Department of Corrections (Doc. 12), is GRANTED and this case is REMANDED to the Circuit Court of the Third Judicial Circuit, in and for Hamilton County, Florida, from which it was removed. The Clerk is directed to forthwith take all steps necessary to effectuate such remand.

(b) That all other pending motions should be terminated, and those not rendered moot by the Order of Remand shall remain for consideration in the state court.

3. In Case No. 93-1320 Civ-J-10,

(a) That RULING IS RESERVED upon the Defendants' pending motion for summary judgment (Doc. 73) which is not yet ripe for consideration.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 11 day of January, 1996.

/S/ Wm Terrell Hodges
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 96-2230

BASIC ENERGY CORPORATION,

Plaintiff-Appellant,

versus

LAWTON CHILES, In his official capacity as Governor of the State of Florida, HARRY K. SINGLETARY, JR., in his official capacity as Secretary of the Department of Corrections of the State of Florida,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before ANDERSON, Circuit Judge, FAY and KRAVITCH*, Senior Circuit Judges.

Per Curiam:

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendants the costs on appeal to be taxed by the Clerk of this Court.

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Basic Energy Corporation ("Basic") brought the instant suit in the district court[1] claiming that the Department of Corrections had violated Basic's substantive due process rights. The City of Jasper had commenced condemnation proceedings in state court, obtained from the state trial court an order of taking, and donated the property to the Department of Corrections, which constructed thereon a

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[1] Basic had previously filed a similar suit, which was not consolidated with the instant case and is not involved in this appeal. Basic also removed the condemnation case which was pending in state court. The district court remanded that case to the state court; thus, it too is not involved in this appeal.

prison. The District Court of Appeal for the First District had reversed the state trial court on the ground that the municipal purpose asserted in the trial court was not a valid municipal purpose to support eminent domain; however, the appellate court remanded noting that there may be other valid municipal purposes, e.g., economic development. Basic Energy Corp. v. Hamilton County, 652 So.2d 1237, 1239 and n.4 (Fla. Dist.Ct.App. 1995) (per curiam).

Although Basic claims there have been substantive due process violations, Basic's only arguments in support thereof are certain deficiencies in the condemnation proceedings, i.e., deficiencies of state substantive or procedural law. For example, Basic argues that the Department of Corrections has no power of eminent domain under Florida law, and that the Department failed to follow certain procedures prescribed by Florida law. We readily conclude that there has been no substantive due process violation in this case. The deficiencies in the on-going state condemnation proceedings cited in Basic's brief clearly do not rise to the level of substantive due process violations.[2]

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[2]Thus we need not, and expressly do not, decide whether a substantive due process violation might arise under other circumstances in connection with a state or local government's taking of private property. Nor need we address the Rooker- Feldman problem noted by the district court. Rooker v. FidelitY Trust Co., 263 U.S. 413, 44 S.Ct. 149 tl923); District of Columbia Court of Appeals v.

Accordingly, the judgment of the district court is

AFFIRMED.

Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983).

42 U.S.C. 1983 (1994). Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. 2201(1994). Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

§20.315, Florida Statutes (1995): Department of Corrections. ---

There is created a Department of Corrections.

(1) PURPOSE. The purpose of the Department of Corrections is to integrate the delivery of all offender rehabilitation and incarceration services that are deemed necessary for the rehabilitation of offenders and the protection of society. The goals of the department shall be:

(a) To protect society by providing incarceration as an appropriate deterrent to the commission of crime.

(b) To protect society by substituting for retributive punishment methods of training and treatment which correct and rehabilitate offenders who violate laws.

(c) To provide an environment for incarcerated persons in which rehabilitation is possible. This should include the protection of the offender from victimization within the institution and the development of a system of due process and internal legality in institutions.

(d) To provide meaningful community supervision for offenders on parole and probation and to develop community alternatives to traditional incarceration which could be safely used.

(e) To provide rehabilitative programs, which may include both academic and [Footnote 1] career education, to

incarcerated offenders and offenders being supervised in the community.

§20.04 Florida Statutes (1995) Structure of executive branch. ---

The executive branch of state government is structured as follows:

(1) The department is the principal administrative unit of the executive branch. Each department must bear a title beginning with the words "State of Florida" and continuing with "Department of ."

(2) For field operations, departments may establish district or area offices that combine division, bureau, section, and subsection functions.

(3) For their internal structure, all departments, except for the Departments of Health and Rehabilitative Services, Corrections, Revenue, and Transportation, must adhere to the following standard terms:

(a) The principal unit of the department is the "division." Each division is headed by a "director."

(b) The principal unit of the division is the "bureau." Each bureau is headed by a "chief."

(c) The principal unit of the bureau is the "section." Each section is headed by an "administrator."

(d) If further subdivision is necessary, sections may be divided into "subsections," which are headed by

"supervisors."

(4) Within the Department of Health and Rehabilitative Services there are organizational units called "offices," integral to the positions of deputy secretary, assistant secretary, and deputy assistant secretary, and organizational units called "program offices," which operate in a staff capacity to the Deputy Secretary for Human Services.

(5) Within the Department of Corrections the principal policy and program development unit of the department is the "office." Each "office" is headed by a director.

(6) Within the Department of Transportation the principal policy and program development unit of the department is the"office." Each "office" is headed by a director.

(7)

(a) Unless specifically authorized by law, the head of a department may not reallocate duties and functions specifically assigned by law to a specific unit of the department. Those functions or agencies assigned generally to the department without specific designation to a unit of the department may be allocated and reallocated to a unit of the department at the
discretion of the head of the department.

(b) Within the limitations of this subsection, the head of the department may recommend the establishment of

additional divisions, bureaus, sections, and subsections of the department to promote efficient and effective operation of the
department. However, additional divisions, or offices in the Department of Health and Rehabilitative Services, the Department of Corrections, and the Department of Transportation, may be established only by specific statutory enactment.
New bureaus, sections, and subsections of departments may be initiated by a department and established as recommended
by the Department of Management Services and approved by the Executive Office of the Governor, or may be established
by specific statutory enactment.

(c) For the purposes of such recommendations and approvals, the Department of Management Services and the Executive
Office of the Governor, respectively, must adopt and apply specific criteria for assessing the appropriateness of all reorganization requests from agencies. The criteria must be applied to future agency requests for reorganization and must
be used to review the appropriateness of bureaus currently in existence. Any current bureau that does not meet the criteria
for a bureau must be reorganized into a section or other appropriate unit.

(8) The Executive Office of the Governor must maintain a

current organizational chart of each agency of the executive
branch, which must identify all divisions, bureaus, units, and subunits of the agency. Agencies must submit such organizational charts in accordance with guidelines established by the Executive Office of the Governor.

810.09 Trespass on property other than structure or conveyance. ---

(1) Whoever, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011, commits the offense of trespass on property other than a structure or conveyance.

(2)

(a) Except as provided in this subsection, trespass on property other than a structure or conveyance is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) If the offender defies an order to leave, personally communicated to him by the owner of the premises or by an authorized person, or if the offender willfully opens any door, fence, or gate or does any act that exposes animals, crops, or other property to waste, destruction, or freedom, unlawfully dumps litter on property, or trespasses on property other than a structure or conveyance, he is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) If the offender is armed with a firearm or other dangerous weapon during the commission of the offense of

trespass on property other than a structure or conveyance, he is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any owner or person authorized by the owner may, for prosecution purposes, take into custody and detain, in a reasonable manner, for a reasonable length of time, any person when he reasonably believes that a violation of this paragraph has been or is being committed, and he reasonably believes that the person to be taken into custody and detained has committed or is committing such violation. In the event a person is taken into custody, a law enforcement officer shall be called as soon as is practicable after the person has been taken into custody. The taking into custody and detention by such person, if done in compliance with the requirements of this paragraph, shall not render such person criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(d) The offender shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property trespassed is a construction site that is legally posted and identified in substantially the following manner: This area is a designated construction site, and anyone trespassing on this property shall, upon conviction, be guilty of a felony.

(e) The offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property trespassed upon is commercial horticulture property and the property is legally posted and identified in substantially the following manner: "THIS AREA

IS DESIGNATED COMMERCIAL PROPERTY FOR
HORTICULTURE PRODUCTS, AND ANYONE WHO TRESPASSES
ON THIS PROPERTY COMMITS A
FELONY."

§944.095 Florida Statutes (1995) Siting of additional correctional facilities; procedure. ---

(1) It is the intent of the Legislature that the siting of additional correctional facilities shall be achieved in the most cost-efficient manner possible.

(2) When the department proposes a site for a state correctional facility, it shall request that the local government having jurisdiction over such proposed site determine whether or not the proposed site is in compliance with local government comprehensive plans, local land use ordinances, local zoning ordinances or regulations, and other local ordinances in effect at the time of such request. If no such determination is made within 90 days of the request, it shall be presumed that the proposed site is in compliance with such plans, ordinances, or regulations.

(3) If the local government determines within 90 days of the request that construction of a correctional facility on the proposed site does not comply with any such plan, ordinance, or regulation, the department may request a modification of such plan, ordinance, or regulation without having an ownership interest in such property. For the purposes of this section, modification includes, but is not limited to, a variance, rezoning, special exception, or any other action of the local government having jurisdiction over the proposed site which would authorize siting of a correctional facility.

(4) Upon receipt of a request for modification from the department, the local government may recommend alternative sites to the department and shall give notice and hold a public hearing on the request for modification in the same manner as for a rezoning as provided under the appropriate special or local law or ordinance, except that such proceeding shall be recorded by tape or by a certified court reporter and made available for transcription at the expense of any interested party.

(5) When the department requests such a modification and it is denied by the local government or there is no action on such request within 90 days of the request, the department may appeal the decision of the local government on the requested modification of local plans, ordinances, or regulations to the Governor and Cabinet.

(6) The Governor and Cabinet shall consider the following when determining whether to grant the appeal from the decision of the local government on the requested modification:

(a) The record of the proceedings before the local government.

(b) Reports and studies by any other agency relating to matters within the jurisdiction of such agency which matters may be potentially affected by the proposed site.

(c) Existing studies and reports and information maintained by the department as the Governor and Cabinet may

request addressing the feasibility and availability of alternative sites in the general area.

(7) The Governor and Cabinet, upon determining that the local government has recommended no feasible alternative site and that the interests of the state in providing correctional facilities outweigh the concerns of the local government, shall authorize construction and operation of a correctional facility on the proposed site notwithstanding any local plan, ordinance, or regulation.

(8) The Governor and Cabinet may adopt rules of procedure to govern these proceedings in accordance with the provisions of s. 120.54.

(9) Actions taken by the department or the Governor and Cabinet pursuant to this section shall not be subject to the provisions of ss. 120.56 and 120.57. The decision by the Governor and Cabinet shall be subject to judicial review pursuant to s. 120.68 in the District Court of Appeal, First District.

(10) Insofar as the provisions of this section are inconsistent with the provisions of any other law, general, special, or local, the provisions of this section are controlling. Additionally, the criteria and procedures set forth in this section supersede and are in lieu of any review and approval required by s. 380.06.

§944.10 Florida Statutes (1995). Department of Corrections to provide buildings; sale and purchase of land. ---

(1) It is the intent of the Legislature to expedite the siting of, acquisition of land for, and construction by the Department of Corrections of state correctional facilities operated by the department or a private vendor under contract with the department. Other agencies shall cooperate with the department and expeditiously fulfill their responsibilities to avoid unnecessary delay in the siting of, acquisition of land for, and construction of state correctional facilities. This section and all other laws of the state shall be construed to accomplish this intent. This section shall take precedence over any other law to the contrary.

(2) The department shall cause all necessary buildings, facilities, and physical plants to be erected to accommodate all prisoners and from time to time shall make such additional alterations as may be necessary to provide for any increase in the number of prisoners; it shall cause to be established proper accommodations for such officers of the department who are required to reside constantly within the precincts of the institutions.

(3)

(a) The department may enter into lease-purchase agreements to provide correctional facilities for the housing of state inmates. However, no such lease-purchase

agreement shall be entered into without specific legislative authorization of that agreement, and funds must be specifically appropriated for each lease-purchase agreement. The facilities provided through such agreements shall meet the program plans and specifications of the department. The department may enter into such lease agreements with private corporations and other governmental entities. However, notwithstanding the provisions of s. 255.25(3)(a), no such lease agreement may be entered into except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder.

(b) Such a lease-purchase agreement which is for a term extending beyond the end of a fiscal year shall be subject to the provisions of s. 216.311.

(4)

(a) Notwithstanding s. 287.057 or s. 253.025, whenever the department finds it to be necessary for timely site acquisition, it may contract without the need for competitive selection with one or more appraisers whose names are contained on the list of approved appraisers maintained by the Division of State Lands of the Department of Environmental Protection in accordance with [Footnote 1] s. 253.025(7)(b). In those instances in which the department directly contracts for appraisal services, it must also contract with an approved appraiser who is not employed by the same appraisal firm for review services.

(b) Notwithstanding [Footnote 1] s. 253.025(7), the department may negotiate and enter into an option contract before an appraisal is obtained. The option contract must state that the final purchase price cannot exceed the maximum value allowed by law. The consideration for such an option contract may not exceed 10 percent of the estimate obtained by the department or 10 percent of the value of the parcel, whichever amount is greater.

(c) This subsection does not apply to any purchase or acquisition of state land except for a purchase or acquisition made specifically for correctional facilities. This subsection does not mitigate in any manner the authority of the Board of Trustees of the Internal Improvement Trust Fund or the Division of State Lands to approve any contract for purchase for state lands as provided by law or to require policies and procedures to obtain clear legal title to parcels purchased for state purposes.

(5) The department may sell, to the best possible advantage, any or all detached parcels of land belonging to the bodies of land purchased for the state correctional institutions. The department is authorized to purchase any contiguous parcels of land within the boundary lines of the lands purchased for state correctional institutions.

(6) The department is authorized to begin preliminary site preparation and obtain the appropriate permits with regard to the construction of state correctional institutions after approval by the Board of Trustees of the Internal

Improvement Trust Fund of the purchase agreement or option agreement if, in the department's discretion, commencing construction is in the best interests of the state.

§945.27 Florida Statutes (1994) Proceedings by department. ---

(1) Whenever it becomes necessary to increase the number of prison beds by acquiring private property for the construction of new correctional facilities or for the expansion of existing facilities, and the property cannot be acquired by agreement satisfactory to the Department of Corrections and the parties interested in, or the owners of, the private property, the department is hereby empowered and authorized to exercise the right of eminent domain and to proceed to condemn the property in the same manner as provided by law for the condemnation of property. The Board of Trustees of the Internal Improvement Trust Fund must approve the institution of any condemnation action before the action is filed by the department.

(2) Any suit or action brought by the said department to condemn property as provided in this section shall be brought in the name of the Department of Corrections, and it shall be the duty of the Department of Legal Affairs to conduct the proceedings for, and to act as counsel for, the said department.

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